United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-6041

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

B
P/S

JOHN L. BEATTIE, JR.,

Appellant

v.

UNITED STATES OF AMERICA and DONALD M. CERRA, Special Agent of the Internal Revenue Service,

Appellees

Docket No. 75-6041

REPLY BRIEF FOR APPELLANT

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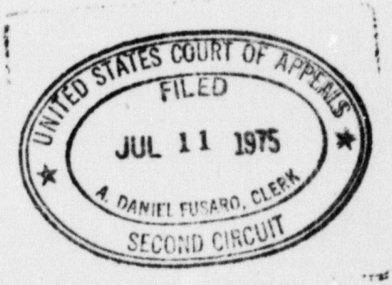

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REPLY BRIEF FOR APPELLANT

I. The Workpapers, in the Taxpayer's Rightful Possession, Were No Less Personal, Private, or Privileged Than the Books and Records From Which They Were Derived.

The following principles are now well established. They are of primary importance to the issue in this case, and we do not understand the government to dispute them:

1. "The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life." Bellis v. United States, 417 U.S. 85, 87-88.

2. Possession of papers, not ownership, "sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit." United States v. Cohen, 388 F.2d 464, 468 (C.A. 9th), quoted with approval in Couch v. United States, 409 U.S. 322, 330, note 12. The Supreme Court added that, "Though the instant case concerns the scope of the privilege

for an owner, nonpossessor, the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate." (ibid, note 12).

The government does not question the fact that the taxpayer had rightful possession of the workpapers for nearly eight months before the summons was served. Indeed it argues that the papers would not be privileged even if the taxpayer both owned and possessed them. (Government Brief, 11, note 9; 20). The government says, "that the question is not whether the claimant's possession of the documents is wrongful, but whether they are his private papers." (Government Brief, 22).

Thus, though it expresses it in various ways, the government in substance falls back upon its "privacy" argument. It is apparently the government's position that merely because the workpapers were prepared by "an outside accountant" (Government Brief, 22), albeit from the taxpayer's own books and records, they can never be "private" or privileged irrespective of whether or how long the taxpayer had them in his rightful personal possession, with or without ownership. This view, we submit, cannot be reconciled with the Supreme Court's recognition in Couch that legal title is not a condition precedent to the privilege, but that, rather, possession bears the most significant relationship to the privilege.

The Couch Court thus recognized that, in an appropriate case, a possessor, non-owner, would be entitled to assert the

privilege. But surely the owner, as well as the possessor, would have had knowledge concerning what the papers contain -- particularly if the owner were the accountant who prepared them. Certainly, in the Couch view, this does not make the papers "non-private," and thus defeat the privilege. Otherwise, the Supreme Court's reference to, and approval of, the Cohen rationale would be meaningless. The government apparently would have us read the Fifth Amendment privilege like the attorney-client privilege -- that is, as being destroyed simply because some third party also obtains knowledge of the information. Clearly, this is not the law. To read the amendment in such a narrow and restricted way would fly in the face of the Supreme Court's recent assertion that, "This Court has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action." Maness v. Meyers, ___ U.S. ___, 42 L Ed 2d 574, 589. (Emphasis added).

"Privacy" for Fifth Amendment purposes does not turn upon who prepared the papers but rather on the nature of the information which they contain. Since the workpapers necessarily reflect the same personal and financial information as the taxpayer's books and records from which they were prepared, the workpapers in the taxpayer's hands are no less "private" than his books and records.

The government's contention that disclosure of the

information to a third party defeats the privilege would prove too much. It would mean that if the taxpayer made his books and records available to his accountant even for a brief period, for whatever purpose, the privilege would be forever lost even after the accountant returned the books. Clearly that is wrong. Nor is it meaningful to refer to the workpapers as "third-party records." (Government Brief, 6). For there will always be "third-party records" where ownership and possession diverge. But Couch holds that such divergence does not defeat the possessor's privilege.

What we are really dealing with in this case is the proper application of the Couch language and rationale -- particularly with respect to its approval of Cohen's "linkage of possession to the purposes served by the privilege * * *." Couch v. United States, 409 U.S. 322, note 12, approving in this regard United States v. Cohen, 388 F.2d 464, 468 (C.A. 9th). It therefore serves no purpose to count or enumerate pre-Couch cases in which the courts did not have the benefit of that Supreme Court decision. (See Government's Brief, 21, footnote 15).

The government, while acknowledging that the taxpayer's position is squarely supported by both the Ninth Circuit's decision in Cohen and the Fifth Circuit's decision in United States v. Kasmir, 499 F.2d 444, cert. granted, 420 U.S. 906, says, "it is our position that those cases were wrongly decided." (Government

Brief, 11). But the government does not explain how this position can be reconciled with the Supreme Court's explicit approval, in Couch, of Cohen's linkage of possession and privilege. If the Supreme Court did not thereby mean to approve the holding in Cohen that accountants' workpapers in the taxpayer's rightful possession are privileged, then plain words do not mean what they say.

The government's argument essentially comes to this: although the books and records of a proprietor are privileged, the workpapers summarizing or derived from them are not privileged in the taxpayer's possession because prepared by "an outside accountant." Once we read technical rules of ownership out of the case, as Couch holds we must, this contention falls apart. For the accountant's workpapers in the taxpayer's possession then stand on no different footing from the taxpayer's books and records for Fifth Amendment purposes: the element of compulsion against the taxpayer personally is no less present; the workpapers are no less testimonial or communicative; and the workpapers are no less "private" or "personal," because the workpapers reflect the same personal, financial, and non-public information as the books from which they are derived.

The government argues that production of the workpapers would not require testimonial compulsion. (Government Brief, 25). Again, this contention would prove too much. For the same argument could be made with respect to the admittedly privileged books and records themselves. It is the information contained in the

books and records which is testimonial and communicative, which is why they are privileged and have so been held in a string of cases from Boyd v. United States, 116 U.S. 616 to Bellis v. United States, 417 U.S. 85, 87, 88. And this is no less true of the accountant's workpapers.

The government's reliance on cases dealing with records of dissolved corporations or partnerships is obviously misplaced. (Government's Brief, 15-17). Those cases are nothing more than the applications of the well-established principle that the privilege does not apply to records concerning the financial affairs of some entity other than the taxpayer himself. We are dealing, in this case, not with records pertaining to some other entity, but with records pertaining to the personal affairs of this very taxpayer and his sole proprietorship; and this is just as true of the workpapers in the taxpayer's possession as of the original books of entry.

II. Since the Taxpayer had Possession of the Workpapers in a Personal Capacity for Nearly Eight Months Before the Summons was Served, it is Immaterial that He Obtained Them After the Investigation Commenced.

The special agent first called on the taxpayer on or about January 9, 1974 (App. 14). The taxpayer obtained possession of the workpapers on or about January 18, 1974. Ibid. The summons was not served on the taxpayer until September 13, 1974 -- almost eight months later. (App. 6, 7).

The Supreme Court stated in Couch that, "the rights and obligations of the parties became fixed when the summons was served * * *." 409 U.S. 322, 329 (note 9). The government apparently would move this time back to the date when the investigation started. It suggests that there is something sinister about a taxpayer obtaining workpapers after an investigation has started but long before a summons is served upon him. (Government Brief, 19). But a taxpayer may wish to obtain the papers for a variety of reasons having nothing to do with the Fifth Amendment. For example, he may wish to review them personally or with his attorney in preparation for I.R.S. conferences. Or he may wish to compare them with his books and records, and tax returns, for accuracy. Even if one of his motives is to assert the Fifth Amendment privilege with respect to the workpapers, this is no more than the law allows. As this Court has held, if the Fifth Amendment privilege applies, the motive for asserting it is immaterial. United

States v. Courtney, 236 F.2d 921 (C.A. 2nd).

The taxpayer in this case obtained the workpapers openly, without subterfuge, and with his accountant's complete acquiescence and approval. Since the taxpayer had paid for the accounting services, including the preparation of the workpapers, and the accountant had no need for them, it was the accountant's view that the taxpayer was entitled to have them if he so desired. (App. 16). Nor is this a case in which the taxpayer has engaged in a "footrace" with the special agent. Over a week elapsed, following the special agent's call, before the taxpayer obtained the workpapers.[1] And, as pointed out, it was not until almost eight months later that the special agent served the summons. If the taxpayer really had some sinister motive, he thus had a period of almost eight months within which he could have destroyed or disposed of the workpapers, and would have been completely within his legal rights in doing so. That he openly and admittedly retained possession of the workpapers thoughout that entire period speaks strongly of his good faith and lack of any culpable motive.

Whatever limitations might apply to the concept of "rightful possession" in a "footrace" case, or a case in which there is persuasive evidence of a taxpayer's bad faith, that is not this

1. In United States v. Kasmir, 499 F.2d 444 (C.A. 5th), cert. granted 420 U.S. 906, and United States v. Cohen, 388 F.2d 464 (C.A. 9th), the Court upheld the privilege notwithstanding the fact that the taxpayer obtained the records from the accountant on the very day following the special agent's visit.

case. This taxpayer's "rightful possession" is, we submit, beyond reasonable dispute.

III. The Taxpayer Properly Asserted His Privilege Under the Fifth Amendment.

It is not clear from the government's Brief whether it now, for the first time, challenges the manner in which the taxpayer asserted his privilege. (See government's Brief, 27, footnote 19). As the government says, it "did not in the proceedings below either raise the point or demand a personal invocation of the privilege in open court." (ibid). In any event, it is abundantly clear that the taxpayer took all appropriate action to assert his privilege. He appeared in response to the summons, and personally asserted the privilege. (App. 8,13,15). His attorney likewise asserted the privilege on the taxpayer's behalf. (App. 13). In the Answer to the Petition for Enforcement, the taxpayer, by his attorney, reasserted his privilege. (App. 11). And in his affidavit in the enforcement proceeding, the taxpayer personally reasserted his privilege. (App. 15).

It is difficult to imagine what more the taxpayer might have done to make it clear that he was asserting his rights under the Fifth Amendment. His affidavit in the enforcement proceeding (App. 14,15) stands on the same footing as testimony in open court for this purpose, and indeed the Court declined to hear testimony. (Transcript of Proceedings, January 27, 1975, p. 9). Moreover it is the rule in this Circuit, as in most, that an attorney may invoke a client's Fifth Amendment privilege on his behalf. Colton v. United States, 306 F.2d 633, 639 (C.A. 2nd).

(See in this connection "Answer to Petition to Enforce Internal Revenue Service Summons," App. 9, 11, par. 14).

The summons not only required the taxpayer to produce workpapers, but "to give testimony" relating to his own tax liability. (App. 6). The order of the Court below directed enforcement of the summons. (App. 17,18). The Appellant has appealed from each and every part of that order. (App. 23). The government nevertheless says that, "any question * * * as to the giving of testimony, apart from the act of producing the records, is not now before this Court" because the taxpayer "must appear * * * and elect to take or not to take the privilege * * * as to each question asked." (Government Brief, 25, footnote 18). The taxpayer did appear in response to the summons. (App. 4, 13,15). He stated at that time that he was declining to give testimony on Fifth Amendment grounds. (App. 13,15). The special agents did not ask him to give any further testimony at that time. (App. 13). Accordingly, the taxpayer did everything he possibly could to assert the privilege -- both with respect to the requested records and his testimony. He could not very well elect to take or not to take the privilege "as to each question asked" if the special agents chose not to ask any further questions.

CONCLUSION

The order of the Court below should be reversed, with

instructions to dismiss the petition to enforce the summons.

Respectfully submitted,

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July 10, 1975

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Reply Brief for Appellant has been made this 10th day of July, 1975 on counsel for Appellees by depositing copies thereof in the United States Mail, postage prepaid, addressed to:

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